In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1330

K. O. SIBLEY, ET AL., PETITIONERS

v.

RURAL ELECTRIFICATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RURAL ELECTRIFICATION ADMINISTRATION IN OPPOSITION

OPINION BELOW

The opinion and order of the district court (Pet. App. 24–28) are not reported. The opinion of the court of appeals (Pet. App. 23–24) is reported at 419 F. 2d 384.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1969. A timely petition for rehearing was denied on December 18, 1969. The petition for a writ of certiorari was filed on March 18, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

385-354—70

QUESTION PRESENTED

Whether the courts below correctly held that they were without jurisdiction to review the grant of a loan by the Rural Electrification Administration in a suit by shareholders of the beneficiary of such loan.

STATEMENT

1. This is the third in a series of actions attempting to enjoin the consummation of a fifty-six million dollar loan from the Rural Electrification Administration (REA) to the Louisiana Electric Cooperative, Inc. (LEC) for the construction of generating and transmission facilities to supply power to LEC's member distribution cooperative. The plaintiffs in this action are members of Dixie Electric Membership Corporation (Dixie), a cooperative engaged in the distribution and sale of electricity which, along with eleven other distribution cooperatives, is a member of LEC. Through a shareholders' derivative action, the plaintiffs seek, insofar as the REA is concerned, to enjoin the consummation of the REA loan to LEC.

a. Much of the background of this action is set forth in the Fifth Circuit's opinion in *Rural Electrification Administration* v. *Central Louisiana Electric Co.*, 354 F. 2d 859, certiorari denied, 385 U.S. 815.

On September 12, 1964, the REA approved a loan of $56,521,000 to the Louisiana Electric Cooperative, Inc. This loan was granted under the Rural Electrification Act, 7 U.S.C. 901 *et seq.*, and would enable the LEC to construct facilities for the generation and

transmission of electric power to various member electric cooperatives (including Dixie) which are presently being served by private power companies.

Approximately two weeks after the loan was approved, Central Louisiana Electric Company, a private power company, brought suit to enjoin its consummation, claiming, *inter alia,* that the loan violated the purposes of the Rural Electrification Act; the directives of certain congressional committees; REA Bulletin 111–3; and Central Louisiana's constitutional rights. The district court granted a preliminary injunction and the government appealed.

In the Fifth Circuit, the government's principal contention was that Central Louisiana, and certain other private power companies which had been granted leave to intervene as plaintiffs, lacked standing to maintain the suit. The Fifth Circuit agreed that the private power companies lacked standing and, in addition, held that the loan making authority of the administrator of the REA was not subject to judicial review. This Court denied certiorari (385 U.S. 815).

b. On October 17, 1968, the same private power company, Central Louisiana, filed a second complaint in the district court. *Central Louisiana Electric Co.,* v. *Rural Electrification Administration,* (Civil No. 14,164; W.D. La.). In that complaint, it challenged the same loan on the identical grounds advanced in the first suit and again sought an injunction restraining the consummation of the loan. The district court entered a temporary restraining order.

The government immediately filed a notice of appeal, and, on December 18, 1968, filed in the Fifth Circuit an application for a stay, pending appeal, of the injunction. In the alternative, the government asked the Fifth Circuit to issue a writ of prohibition and/or mandamus against the district court. On December 23, 1968, the Fifth Circuit entered an order stating that the "[g]ranting of a further temporary restraining order by the District Court would, in our view, be improvident * * *." *Central Louisiana Electric Co.* v. *Rural Electrification Administration* (No. 27097; C.A. 5).

c. On December 31, 1968, eight days after the Fifth Circuit entered its order in the second Central Louisiana suit, the present plaintiffs filed the complaint in the instant case again attacking the same REA loan. The plaintiffs allege that they are members of Dixie Electric Membership Corporation, one of the twelve distribution cooperatives that are members of the Louisiana Electric Cooperative. These plaintiffs seek to enjoin the carrying out of the same loan contract between the ~~real United States~~ U.S.A. and LEC. They contend, *inter alia,* that the loan is at variance with the purposes of the Rural Electrification Act, 7 U.S.C. 901, *et seq.,* that the project is economically unfeasible, that the resulting agreements would violate Federal Anti-Trust statutes, that REA has not complied

with its Bulletin No. 111–3, and that the LEC does not possess an allegedly required certificate from state authorities.

2. On January 22, 1969, the district court denied the plaintiffs' motion for a preliminary injunction. The court noted that because the Fifth Circuit had held that the decision of the Administrator is judicially non-reviewable, the plaintiffs could not establish one of the primary prerequisites for a preliminary injunction, *i.e.*, a substantial likelihood of success on the merits. Subsequently the district court granted the government's motion to dismiss the complaint, and entered an order dismissing the action on the alternative grounds of judicial non-reviewability and the plaintiffs' lack of standing to maintain the suit. On November 10, 1969, the Fifth Circuit affirmed.

ARGUMENT

Although the test of standing that the district court applied here was more restrictive than that subsequently announced by this Court in *Association of Data Processing Service Organization, Inc.*, v. *Camp* (No. 85, decided March 3, 1970), we submit that the district court properly dismissed the complaint because (1) petitioners failed to show either that the interest they sought to protect was arguably within the zone of interests protected or regulated by the statute in question or that they had a sufficient legal interest to

entitle them to enjoin the consummation of the loan; and (2) the granting of a loan by the REA is not judicially reviewable.

1. In the *Data Processing* case, the Court held (slip op., pp. 3–4) that the question of standing "concerns * * * whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. * * *" Petitioners, as the power companies before them, cannot meet this test. The provisions of the Rural Electrification Act which petitioners allege were violated by the REA were not intended to protect these petitioners or their interests from the injury they assert will result to them if the loan is fully consummated and the loan proceeds are utilized by LEC to construct and operate the contemplated generation and transmission facilities. Rather, these provisions were enacted for the sole benefit of the United States, their purpose being to safeguard the public interest and, more particularly, to protect the government's security interest.

2. *Data Processing* further held that before persons who are deemed to have standing can prevail on the merits, they must show not only a statutory violation but also that the statute involved gives them "a 'legal interest' which protects them against violations of those Acts" (slip op., p. 7). Petitioners have not shown that the action of the REA about which they complain has invaded any such "legal interest." Nor

have they endeavored to point to any enforceable duty owed by REA to them to refrain from making the allegedly unauthorized loan to the cooperative. A lender's legal obligation to refrain from making an assertedly *ultra vires* loan runs only to the lender's own shareholders. There is no duty to the shareholders of the corporate borrowers which would entitle them to seek relief directly against the lender on the theory that the corporate borrower was somehow injured by accepting and utilizing the loan proceeds.

Nothing in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, is contrary to this position. In *Ashwander*, this Court held that shareholders of a power company had standing to attack a contract for the sale of property to and the purchase of power from the TVA. The Court rested the plaintiffs' standing on the claim that a duty owed to them was being breached by the failure of the power company to resist illegal government demands and coercive interference, the effect of which would be to deprive the company of substantial property and to occasion a loss of business (297 U.S. at 322).

Here, there was no governmental coercion involved in the loan-making process. LEC freely applied for the loan and accepted the loan proceeds upon approval of the application. The conditions imposed on LEC by the REA were not different from those that would be imposed by a private lender in similar circumstances in order to protect his security interest.

3. Quite apart from the question of standing, in *Rural Electrification Administration* v. *Central Louisiana Electric Co.*, 354 F. 2d 859 (C.A. 5), certiorari denied, 385 U.S. 815, which, as noted above, involved an identical attack on this same loan, the Fifth Circuit held that "Congress has never enacted or intended that loans by this Agency should be reviewable in the courts." 354 F. 2d at 865. There is no occasion for further review of this correct holding.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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